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Supreme Court of the United States

OCTOBER TERM, 2002

EDWIN EDWARDS and
STEPHEN EDWARDS,
Petitioners,

--against--

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment right to an impartial, unanimous verdict is violated when a court, after extensive inquiry during the deliberations themselves, dismisses a juror who it knows to be leaning towards acquittal, despite the possibility that the juror's dismissal has been sought (and ultimately granted) because of his views of the evidence.

2. Whether the Sixth Amendment is violated when juror identifying information, including the jurors' names, addresses and places of employment, is withheld from the parties in order to protect the jurors, not from the defendants, but from the media.

3. Whether a court, in considering whether probable cause exists after purging a misleading search warrant affidavit of its misleading content, may retroactively consider materials in making the probable cause determination that were not presented to the judicial officer who issued the warrant.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below are: Cecil Brown, Andrew Martin, and Bobby Johnson.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 303 F.3d 606 (5th Cir. 2002), and is set forth at App. 1. The order denying petitioners' petitions for rehearing and rehearing en banc is not reported, and is set forth at App. 74. The opinion of the United States District Court for the Middle District of Louisiana denying defendant's motion for a new trial is not reported and is set forth at App. 76; the opinion granting the government's motion for an anonymous jury is reported at 119 F. Supp.2d 589 (M.D. La. 2002) and is set forth at App. 137; the opinion denying the defendant's motion to suppress is reported at 124 F. Supp.2d 387 (M.D. La. 2002) and is set forth in App. 211. The opinion of the United States Court of Appeals for the Fifth Circuit in United States v. Brown, a decision adopted by the Fifth Circuit in this case, is reported at 298 F.3d 392 (5th Cir. 2002) and is set forth at App. 300.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 23, 2002. (App. 1) Petitioners timely filed petitions for rehearing and for rehearing en banc, which were denied on September 23, 2002. (App. 74) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Federal Rule of Criminal Procedure 23(b) provides:

> **(b) Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

STATEMENT OF THE CASE

This Petition raises three important constitutional issues stemming from the trial and conviction of the former four-term Governor of Louisiana, Governor Edwin Edwards. Governor

Edwards and his son, Stephen Edwards, were convicted on May 9, 2000, of RICO, extortion and mail fraud in connection with allegations that Governor Edwards accepted money in exchange for his support of riverboat gambling license applications. (R7688-83, 9819) On January 8, 2001, Governor Edwards was sentenced to a term of imprisonment of 120 months, and Stephen was sentenced to 84 months. (R9848) On August 23, 2002, the Fifth Circuit affirmed the convictions. (App. 1)

1. The first issue raised in this Petition is one that, in recent years, has sharply divided the lower courts. It concerns the standards that a court must apply before dismissing a juror during deliberations when it is clear that the juror has taken a dissenting or minority position. In this case, "Juror 68,"[1] through no fault of his own, came to the attention of the court during the trial when he became the target of a vindictive campaign by former parishioners of his church, who accused him of talking about the case while in church. An inquiry was conducted and the court determined that the accusations were baseless. (C3/21/00/pp.2-50; C4/3/00/p.11; C4/18/00/p.10)

The jury began its deliberations on April 24, 2000. The next day, this same juror mistakenly brought a dictionary and thesaurus into the jury room – a common occurrence and one that rarely, if ever, constitutes grounds for a mistrial.[2] The court had

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[1] The jurors were identified solely by number. Their names and other identifying information were withheld from the parties because of the publicity surrounding the trial. The propriety of that procedure is the second issue raised in this Petition.

[2] See, e.g., United States v. Cheyenne, 855 F.2d 566 (8th Cir. 1988) (dictionary); United States v. Steele, 785 F.2d 743 (9th Cir. 1986) (dictionary); United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990), cert. denied, 500 U.S. 916 (1991) (book

not previously given the jurors an instruction prohibiting them from using a dictionary, and several jurors, including the foreman, thought this was an honest mistake and one that he or she could have made. The court did not question the jurors to determine if they had used the dictionary, or to see if there was any taint. Instead, the court instructed the jurors that they were not permitted to bring in a dictionary, or do "research at home," or bring in any "materials," other than their "notes." (T4/25/00/pp.11-21, 24-43; T5/2/00/p.5, 213)

On the third day of deliberations, April 26, 2000, the jurors sent the court a note indicating that they were not able to "reach an agreement" on "any of what we are working on." The court expressed concern over whether the jury was "hopelessly deadlocked." (C4/26/00/p.2)

The next day, April 27, 2000, Juror 68 came out of the jury room, visibly upset. At the Judge's instructions, he wrote a note, asking whether he had to "explain doubts in [his] mind?" and stressing that he was "being very intimidated because how I may feel." (R7621)[3] Although the note did not mention

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about jury duty); United States v. Bassler, 651 F.2d 600 (8th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (Robert's Rules of Order). Indeed, in United States v. Griffith, 756 F.2d 1244 (6th Cir.), cert. denied, 474 U.S. 837 (1985), the Judge's own law clerk furnished the jury with a dictionary, illustrating that someone well-versed in courtroom procedure may be mistaken about what is allowed.

[3] The note reads as follows:

"Very confidential. Please!

Do I have to explain doubts in my mind? #68

I am being very intimidated because how I may feel, can we say.

Could this have been what it was (evidence) or

religion, the government immediately moved for his dismissal, claiming that the juror, who was known to be a member of a Pentecostal Church, had religious beliefs that precluded his rendering a verdict. The court did not engage in any inquiry to determine the nature of the intimidation, but instead sent the jury back for further deliberations. (C4/27/00/p.44-113)

There was another full day of deliberations. On May 1, 2000, a few jurors penned a note that said that a juror was "biased," was "refus[ing] to participate in deliberations," and had "his mind made up." (R74646)[4] At that point, the court halted deliberations and brought the foreman in for four separate interviews. The foreman told the court that the target of the note was Juror 68, that he was deliberating and was not biased, although he had some trouble communicating his views, but that there was a "stalemate"– that Juror 68 "will only state his

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could it not have been, With statements that were made during the whole trial. I feel there is such an awesome responsibility with the lives of people in our and my hands that I am trying to errase (sic)some doubts but can't seem to forget them in my mind. If my feelings or thoughts which are seemingly to be affecting the process or the majority of feelings, of others, as much as I do not want to request it; I would request to be dismissed.

Please do not let this note get out into the public. Please Confidential (R7621)

[4] This note read as follows:

CONFIDENTIAL We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses. And has recently gone as far as to tell a fellow juror to not speak to him at all. We do not know how to proceed with this juror's refusal to participate in deliberation. (R7646)

opinion in one direction," and had insisted that **"this is my opinion and I have got a right to it."** (T5/1/00/p.269, 273-82, 291) In the third interview – conducted over vigorous objection since it was clear that Juror 68 was deliberating, that the issue centered on Juror 68's view of the evidence, and that Juror 68 could continue to discharge his duties – the foreman mentioned, almost as an afterthought, that some jurors had seen some incidents involving Juror 68 bringing papers into the juror room. (T5/1/00/p.23)

After the foreman's third interview, the court suddenly remembered two other "incidents" involving Juror 68 that the court had not considered significant at the time. The jurors were provided with notebook binders in which they kept their personal notes. In addition, they were handed binders containing transcripts of wiretaps, and, on occasion, loose transcripts of wiretapped conversations. Both set of binders and the loose transcripts were handed out and picked up out the end of each day. They never left the courtroom, and were often placed on the floor and then retrieved by the clerk. Several jurors "doodled" or made notes in the transcript binders, and, at some point during the trial, the court asked the jurors not to do so. In the first "incident," Governor Edwards had been handed a transcript binder that had the number "68" written on it. No one knew when the number was put on the binder, and no one questioned that it was the inevitable consequence of the daily recycling of binders and of the confusion engendered by having multiple binders with inconsistent instructions on how to mark then.[5] In the second incident, unbeknownst to anyone but the Judge and his clerk, a loose transcript fell out of Juror 68's notebook one evening when the clerk was collecting the notebooks for the

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[5]A much more serious transgression took place during deliberations, when the jurors were inadvertently furnished a binder that contained the government's markings. Nothing was made of this "incident."

night. (T5/1/00/pp.294-95) These incidents were considered so trivial at the time, Juror 68 was never questioned about either one, and, until the incidents were mentioned by the Judge and become a basis for Juror 68's dismissal, the defense had no inkling that they would ever be considered significant.

The next day, while deliberations remained suspended, the foreman was brought back in for further questioning. He openly disclosed matters that took place during the deliberation process, revealing that Juror 68, after deliberating one day, on the next day decided to change his vote, which the foreman opined was "odd." (T5/2/00/p.104) He admitted that Juror 68 was not intimidating other jurors and acknowledged that he did not think there was anything improper about bringing in the dictionary – that he "could have done the same thing." (T5/2/00/p.105) And he again mentioned that Juror 68 supposedly brought a "little yellow paper" into the juror room and, "during a part that was kind of not going well in deliberations," took some sheets out of his notebook and brought them into the bathroom, where he stayed about three to five minutes. (T5/2/00/pp.103-07)

Juror 68 was then called in and shown the note, which he (any many other jurors) had not seen. (T5/2/00/p.156) Juror 68 made it absolutely clear that the disagreement with some of his colleagues stemmed from his view of the evidence. As he put it:

> Based upon everything that was given to us, the evidence that we have heard, seen, and charges that you have given to us, and instruction that you have given to us, when I took an oath to be a juror, right then and there, actually, before that, I have not been biased, prejudiced, I haven't taken sympathy towards anybody as far as my opinion. The charges you gave us and the instructions you gave us, maybe I'm taking it way too serious, I don't know. Maybe I am. Maybe I'm interpreting it – some of the instructions wrong,

because I'm not knowledgeable as far as to legal terms, and items like that. I've just – I've depended a lot on what you told us, or what I understood you to say in the instructions, to put as much weight, or as little weight on whatever that you've give to us, and that we've received during the trial. And this may be wrong. I don't know, but I've depend a lot on one thing to help me make a decision, and that's been my conscience. And I can't apologize for that, and that's all I can say.

And if I'm wrong, you know, I've really, really would appreciate some guidance if I should not go by my conscience and how I feel. I would really appreciate it. But because – I'm sorry - but because I may have a disagreement, or I may not agree with somebody else's view or opinion, I may not, I am not going to criticize their opinion. I'm not going to tell them that they are biased or prejudiced. And I just hate that it's happened to me, and I guess that's what the note was about yesterday.

As far as I know, there were very few of us that were even – we even had knowledge of the note. But I can't apologize for my conscience, you know, and what I feel. That's the one thing I think I've had to help lead me in this. And up until right this moment, I still am not, or have not been swayed or persuaded by anybody else in this world, I can promise you that.

(T5/2/00/p.159-60)

Juror 68 apologized for bringing in the dictionary and thesaurus, explaining that he had not realized it was improper.

He told the court that several jurors had looked up certain words, but that after the court instructed the jurors that they could not use the dictionary, none of the jurors used the dictionary definitions in the deliberations. (T5/2/00/pp.162-166)

The Judge asked Juror 68 a series of ambiguous questions about whether he had brought any "notes, papers, books, charts or whatever" into or out of the jury room. Twice the Judge asked the juror if he had brought "any other notes into the jury from **home**," or whether he had brought any materials out of the jury room "**home** with him." (T5/2/00/pp.164-65) Since, up to this point, the questioning had focused on the dictionary brought in from **home**, the questions could be interpreted as asking whether the juror had brought in or taken **home** any other materials. Juror 68 responded that he only had brought in a bag with medicine. (T5/2/00/pp.164-67)

At one point during this extended interrogation, Juror 68 told the Judge that the repeated questioning of him was causing the other jurors to question what was "going on," advising the Judge that the other jurors believed that the court's persistent questioning of him meant he "had been influenced." As he told the Judge, "when I was out of the jury room the other day, there was a juror that took it upon himself to announce that to every one of the jurors." (T5/2/00/pp.166-67) He was also asked whether he had any religious beliefs that would preclude him from following the court's instructions, to which he replied, "No sir." (T5/2/00/p.168-84) And when asked whether he had been "intimidated or pressured by anyone," he said, **"yes sir. I have been strictly because I feel like it's my feelings and how I've chosen to vote on an issue or a charge."** (T5/2/00/pp.183-84) After the interview was concluded, the Judge commented that **"I think he [Juror 68] was very frank and open."** (T5/2/00/p.186)

Each of the jurors was then brought in for a separate interview. Some mentioned having seen Juror 68 bring a piece

of paper into the juror room, or bring some blanks sheets of paper out into the adjoining bathroom that was part of the secure jury area, although no one knew what was on any of these papers. Some revealed that the jurors were discussing Juror 68 among themselves, perhaps fueling the efforts to have him dismissed. One juror admitted to bringing in magazines, a violation of the court's explicit instructions. Another expressed outright frustration over the length of deliberations, since he had a job interview coming up. One juror said he was "pretty suspicious of [Juror 68's] votes" and that the other jurors had "just tried to explain [to him] that eleven other people . . ." but Juror 68's "mind was already made up." And, most importantly, many jurors displayed open hostility towards Juror 68 because, after this four month trial, he was impeding a verdict. (T5/2/00/pp.199, 202-03, 212-13, 237-38, 246-47, 255, 264-65)[6]

The next day, Juror 68 was brought back in and immediately volunteered that, after "rack[ing] [his] brain" to "think what could [he] have possibly done," he recalled that, on one occasion, while on the marshal's van on the way into court, he had jotted down a question ("the little yellow paper") he "had on [his] mind" and, on another day, during a particularly tense period of deliberations, he had brought some blank sheets of paper into the adjoining bathroom that was part of the secure jury area to write down his wife and son's names, as a means of calming his nerves (the other incident mentioned by some of his fellow jurors). He offered to show the court the question, which was still in his wallet, and said the sheets of paper with his wife and son's names written on them were still in the jury room. (T5/3/00/pp.42-45) The court, however, chose not to look at

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[6] There were suggestions during the questioning that Juror 68 was not alone, and that others, albeit a minority of jurors, might have agreed with him, or at least have been undecided. Those jurors could not help but be influenced by the trial court's repeated questioning of and about Juror 68.

them to confirm whether Juror 68's account was true, and instead discredited Juror 68's uncontradicted account of what the alleged "notes" contained.[7]

Over objection that the process itself was tainting the deliberations, the court then conducted two additional days of hearings, taking testimony from members of Juror 68's church, including his Pastor, purportedly to revisit the discredited allegations made during the trial. (T5/3/00 pp.50-237; T5/4/00 pp.4-37) Throughout this extended process, the government, acknowledging that Juror 68 was not "great" for the government, vigorously argued for his removal. (T5/3/00/p.301)

Finally, on May 5, 2000, four days after the court halted deliberations to conduct an investigation of this one dissenting juror, and a full two weeks after deliberations had begun, Juror 68 was dismissed. The trial court concluded that he had failed to follow instructions and had not been candid with the court when, in his initial interview, he had not mentioned the question he had scribbled on the way into court, or the blank sheets of paper on which he had written his wife and son's names. (T5/5/00/pp.24-51) (App. 99)

The Fifth Circuit affirmed. In a decision that is in conflict with recent decisions rendered by several other Circuits, the Fifth Circuit held that, pursuant to Rule 23(b) of the Federal

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[7] The Fifth Circuit later mischaracterized the evidence, criticizing the juror for keeping the note in his wallet "contrary to the court's instructions." (App. 40) There was never an instruction that prohibited a juror from writing down a question so as not to forget it. Moreover, had the trial court accepted Juror 68's invitation to review the note, it would have conclusively established whether the note was something sinister, as suggested, or just a "question," as Juror 68 maintained.

Rules of Criminal Procedure, a juror may be dismissed during deliberations if the lower court articulates reasons that, on their face, do not refer to the juror's view of the evidence, even if the record reflects that the juror's removal was sought because of his view of the merits of the case.[8] The Fifth Circuit concluded that the nature of any juror inquiry conducted during deliberations, and the motivation for the efforts to remove a juror, are not relevant considerations in evaluating whether the trial court has abused its discretion in dismissing a deliberating juror. (App. 44-46) In other words, in the Fifth Circuit, a trial court may now eliminate a deadlocked jury if it articulates plausible, objective grounds for dismissing the dissenting juror, even if the record reflects that the juror would never have been dismissed on those grounds had his status as a "hold-out" not been revealed.

2. The second issue raised in this Petition concerns the propriety of empaneling an anonymous jury in order to protect the jurors from the media. The district court, sua sponte, first mentioned an anonymous jury at an early status conference, and later issued an order directing "any party that desires to request an anonymous jury" to do so by a set date. (R1991; T6/23/99) Having twice been invited to do so, the government sought an anonymous jury, claiming, primarily, that the trial would engender enormous publicity and potentially subject jurors to harassment. (C3/10/99/p.57;R1996,2202; T6/23/99; T9/17/99/pp.11-32, 42-43) The defendants, arguing that anonymous juries were inherently prejudicial, suggested alternative measures that would protect the jurors from the media without prejudicing the defense – in particular, withholding juror

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[8] The Fifth Circuit relied on the trial court's findings relating to the juror's alleged lack of candor, and to the "dictionary incident," the "binder and notebook incidents," and to the question jotted down on the way into court and the blank sheets of paper taken into the adjoining bathroom, referred to as the "note incidents." (App. 38, 39, 42)

identifying information from the media, but providing it to the parties.

Despite the availability of less prejudicial alternatives, on the eve of trial, the court granted the government's motion, without opinion, and ordered that the issue "not be discussed publicly or in open court." (R5754)[9] Pursuant to its ruling, the court withheld from the defendants and their attorneys the names, addresses and places of occupation of the jurors and their spouses. (R8553)

As feared, the inability to identify the jurors prejudiced the defense. The media reported that anonymous juries are used only when the defendants pose a threat to the jury, and that, for this unusual measure to be employed, the government must have evidence that Governor Edwards posed a threat to juror safety or integrity. (R3041/Exh.A) In addition, the withholding of juror identifying information had real consequences in this case. At the end of the trial, the defense learned that, unbeknownst to the defense, a juror knew Stephen Edwards's in-laws and had made

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[9] Defendants unsuccessfully sought unsealing of the anonymous jury papers and opening of the proceedings because the press, which was aware of the bare-bones, publicly filed motion, but was not given access to the papers which set forth the basis for the motion, was speculating that the government had evidence that Governor Edwards posed a threat to jurors. (R3039, 3047) The district court ruled that total closure was required to protect "the fair trial rights of both the defendants and government," and because "widespread publicity of the defendants' arguments opposing the anonymous jury could encourage the public and potential jurors to associate inaccurate motives with the government's motion." (R4074-73) The Fifth Circuit affirmed, holding that, despite defendants' objections, total closure was an appropriate remedy to protect the defendants from press coverage of the proceedings. (App. 15)

negative comments about Governor Edwards in the past. (T5/10/00/p.2; T5/11/00/pp.6-7) This juror had indicated on an initial questionnaire submitted to the trial judge, but withheld from defense counsel, that she had known "Mrs. Stephen Edwards' mother and grandmother all of [her] life." (Juror Questionnaire #1/Juror 370) But in the questionnaires provided to the defense, and during voir dire questioning, the juror falsely indicated that she had no connection with Stephen Edwards. (Juror Questionnaire #2/Juror 370; T1/10/00/p.53) Thus, the defense, unaware of the woman's name or of her personal animus, did not move to dismiss her for cause, or exercise a peremptory challenge to eliminate her from the jury panel.[10]

On appeal, the Fifth Circuit affirmed. In a break with precedent, the Fifth Circuit held that an anonymous jury may be employed, even if the defendants or their associates do not themselves pose a risk to juror safety or integrity, if the trial court determines that anonymity is warranted to protect the jurors from the media. (App. 8-11)

3. The third issue raised in this Petition concerns what a court may consider in determining whether to hold an evidentiary hearing when an affidavit in support of a search warrant or wiretap application is false and misleading. Here, wiretaps were obtained based on information provided to the government by Patrick and Michael Graham – two con men with a long criminal

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[10] This same juror revealed her bias during the trial, sending the court a note unfairly criticizing the courtroom conduct of Governor Edwards's wife. Although not central to this petition, this Court may want to consider whether it is ever appropriate to deny the defense access to juror background information that is provided to the court. This case illustrates how providing the information to the court, but not to the defense, restricts the usefulness of the information since the court, as here, may not appreciate its significance.

history of deception and manipulation. In the affidavit in support of the wiretap application, as well as in all subsequent affidavits, the government falsely represented that its "confidential witness" (Patrick Graham) was reliable. In fact, the government knew full well that the Grahams were anything but reliable. Indeed, during the same period of time, in bankruptcy court in Texas, the government had characterized these men as "the most manipulative con men probably in the face of the world," and had revealed that "the things that we're not able to independently corroborate, we believe are lies, and that is the way it has to be when you deal with the Grahams." (R3616; R3618/Exh. 2; T8/16/96/pp. 30,42)

The affidavit in support of the wiretap applications contained other misrepresentations and material omissions. It did not disclose: (a) the extent of the confidential informant's criminal history; (b) that the federal prosecutors in Texas had refused to deal with the Grahams because of their lack of reliability; (c) the favorable deal the Grahams had obtained from the Louisiana federal prosecutors; or (d) that the Louisiana prosecutors had constructed a "Chinese Wall" to protect them from learning of the Grahams's criminal activities in Texas, which they then might be required to disclose in a wiretap application in Louisiana. And the affidavit substantially misrepresented the content of consensual recordings made by Graham, purportedly to corroborate his story. Most notably, the affidavit included the following excerpt of a conversation between Graham (the "CW") and another individual, defendant Cecil Brown:

> CW:... Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong with this deal. All right? So we've got to get him, whatever that portion is covered first . . . .
>
> Brown: Yeah.

(R3618/Exh.5/Cleveland aff't/¶30) The excerpt suggests that Brown was acknowledging that the CW had to "get him," that is Governor Edwards, "covered first." In fact, the full exchange, without the ellipsis, and including the very next statements made by Brown, reflects an unequivocal denial by Brown that any money is going to Governor Edwards. The full passage, with the omitted portions underlined, is as follows:

> CW: Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong on this deal. All right? So we've got to get him, whatever that portion is covered first. All I want to do is drag you out and I'm not gonna drag you out more than 90 days.
>
> Brown: Yeah.
>
> CW: I just don't . . . ah, you know, you never have told me what the . . .the . . . the sharing ratio is.
>
> Brown: He doesn't get any. I get it all. I want half right away.

(R3544; R3618/Exh. 7/T5/8/96/p.3)

The defendants moved to suppress the evidence obtained as a result of the wiretaps. The district court denied the motion. (App. 211-99) The Fifth Circuit without any analysis of the issue, affirmed, relying on United States v. Brown, 298 F.3d 392 (5th Cir. 2002), a decision in another appellate case involving the same wiretap applications.[11] There were three opinions in

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[11] Neither Governor Edwards nor Stephen Edwards was an appellate party in Brown and neither had an opportunity to brief the issue in Brown.

Brown, two of the Justices determining that the wiretap affidavit was false and misleading. (App. 326, 335-39) All three Justices, however, relying extensively on material that was not provided to the judicial officer who had granted the wiretap authorization, held that, even if the affidavit was purged of its misleading representations and omissions, there was probable cause to support the warrant. (App. 309, 326, 340) The Brown decision did not address the propriety of a reviewing court relying on materials that had not been presented to the issuing judicial officer, although it was a major issue in this case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT TYPE OF INQUIRY MAY BE CONDUCTED DURING DELIBERATIONS WHEN THERE IS AN EFFORT TO REMOVE A DISSENTING JUROR, AND WHAT STANDARDS MUST BE APPLIED BEFORE DISMISSING A DISSENTING JUROR

The first issue raised in this Petition goes to the heart of the federal criminal justice system and to the role of the court in ensuring that efforts to prevent a deadlock do not undermine the constitutional mandate of unanimity. It is an issue that has taken on extraordinary importance in recent years as courts have increasingly confronted the dismissal of dissenting jurors. The Petition asks: (a) whether Federal Rule of Criminal Procedure 23(b), which authorizes a verdict by 11 jurors when there is "just cause" for dismissing a juror, may be used to remove a capable but dissenting juror for "misconduct" that would not provide grounds for a mistrial or for removal of the juror if his role in deadlocking the jury was not known; and, (b) if so, whether allowing an 11 person jury under those circumstances violates a defendant's Sixth Amendment right to an impartial and unanimous verdict.

The lower courts have grappled with the meaning of "just cause," under Rule 23(b). As the Advisory Committee Notes explain, Rule 23(b) was intended to cover the rare situation where "after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the juror." (Emphasis added) Based on this Rule, the district courts have dismissed jurors who have become unavailable, who are impaired due to mental or physical illness, or who otherwise are unable to render a verdict.[12]

In those cases, the Rule serves a salutary purpose – allowing a trial to proceed to verdict despite the often unforeseeable inability of one juror to continue with his or her duties. Recently, however, the lower courts have faced a far more complex problem and one on which the courts have not agreed – namely, how a court is to proceed when there are allegations by fellow jurors that one juror, inevitably a dissenting or minority juror, is "refusing to deliberate." There is now a clear conflict in the Circuits over the standards the court must apply in reviewing an objection to the dismissal of a "hold-out" juror, over whether the motivation behind the request for dismissal is relevant, and over what type of inquiry may be conducted during the deliberation process when other jurors

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[12] See, e.g., United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992), cert. denied, 508 U.S. 905 (1993) (juror failed to disclose psychiatric problems and entered the hospital during deliberations, threatening suicide); United States v. Reese, 33 F.3d 166, 172-73 (2d Cir. 1994), cert denied, 513 U.S. 1092 (1995) (juror leaving on business trip); United States v. Speer, 30 F.3d 605 (5th Cir.), cert. denied, 513 U.S. 1028 (1994) (inability to understand or communicate in English); United States v. Geffrard, 87 F.3d 448, 451 (11th Cir.), cert. denied, 519 U.S. 985 (1996) (juror admitted that her religious beliefs prevented her from returning a guilty verdict).

complain about a fellow juror's supposed unwillingness to engage in deliberations.

The Second, Ninth and District of Columbia Circuits have agreed that it is improper, indeed, unconstitutional, to discharge a juror if there is even a possibility that the juror's dismissal was prompted by the juror's doubts about the defendant's guilt. United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987) ("if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request"); United States v. Thomas, 116 F.3d 606, 622 (2d Cir. 1997) ("adopting the Brown rule as an appropriate limitation on a juror's dismissal"); United States v. Symington, 195 F.3d 1080, 1087 (9th Cir. 1999) ("if the record evidence discloses any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views on the merits, the court must not dismiss the juror"). These Courts, sensitive to how the majority may become frustrated when one or a few jurors are impeding a verdict, have held that the reason prompting the request for dismissal is a critical factor in evaluating the propriety of the juror's dismissal. In Symington, for example, the Ninth Circuit observed that, while there may have been legitimate concerns about the dismissed juror's abilities, "there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case," and that those frustrations "manifest[ed] themselves in concerns about [her] reasonableness or general capacity as a juror." 195 F.3d at 1088.

The Second, Ninth and D.C. Circuits also have curtailed the power of the district court to engage in inquiry during the deliberation process. As the Second Circuit has explained, "once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important – safeguarding the secrecy of jury deliberations." Thomas, 116 F.3d at 618. Thus, any

inquiry must be limited to questions relating to the juror's capacity to render a verdict, must never relate to the substance of deliberations, and must not, itself, taint the deliberative process.

The standard adopted by the Second, Ninth and District of Columbia Circuits is an objective one: inquiry must cease once it becomes apparent that there is a reasonable possibility that the juror is being challenged because of his view of the merits of the case. In contrast, recently, the Eleventh Circuit, in United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001), cert denied, 123 S.Ct. 74 (2002), held that a district court may dismiss a dissenting juror unless the record demonstrates a "substantial possibility" that dismissal stemmed from the juror's view of the evidence. Id. at 1302. Unlike the Second, Ninth and D.C. Circuits, the Eleventh Circuit countenanced a subjective and extended inquiry into the jurors's views during the deliberative process, and then approved of a lower court's subjective determination to credit the majority that the dissenting juror would not abide by the law, although there was undeniably a "possibility" that the juror's dismissal was sought because of her view of the evidence. Id. at 1303-04.

In this case, the Fifth Circuit has flatly rejected the Brown/Thomas/Symington approach, and has gone even farther than the Eleventh Circuit in allowing a district court virtually unlimited discretion to conduct a broad juror inquiry during deliberations. According to the Fifth Circuit, Brown/Thomas/Symington and Abbell dealt only with potential juror nullification, and the rule announced in those cases would apply, if at all, only when the juror was accused of failing to follow the law. (App. 44-45) Here, of course, Juror 68 was not refusing to follow the Judge's instructions on the law. Indeed, he made a passionate statement about his commitment to abide by the court's instructions and to render a verdict in accordance with his conscience, based on the evidence presented. Under those circumstances, under the Fifth Circuit approach, a rigorous review of the grounds for his dismissal was not warranted.

Instead, an extremely lax "abuse of discretion" standard governs because, although the accusations against Juror 68 were prompted by allegations that he "refused to deliberate," Juror 68 ostensibly was dismissed for conduct unrelated to the initial accusations – bringing in the dictionary, writing a question on a piece of paper while on the way into court, and scribbling his wife's name on a blank sheet of paper.

None of this conduct, trivial by any standard, rendered Juror 68 incapacitated or incapable of rendering a verdict – the standard contemplated by Rule 23(b). Indeed, none of the conduct even violated any explicit jury instruction. Nevertheless, according to the Fifth Circuit, even if it is apparent that a juror is leaning towards acquittal, the district court is accorded virtually unfettered discretion to dismiss that juror based on a technical claim that the juror is not following instructions about the process of deliberations.[13]

Moreover, in the Fifth Circuit, unlike its sister Circuits, the motivation underlying the request for the juror's dismissal is not "in any manner controlling," provided the lower court, as it did here, has articulated a justification for the dismissal that on its face appears unrelated to the juror's view of the evidence. (App. 46) In essence, the Fifth Circuit's opinion invites judges to resolve deadlocks by finding objective and plausible grounds for dismissing the dissenting juror, even if the same alleged "misconduct" would never provide grounds for reversal if the

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[13] Jurors are under enormous stress and often deviate from the technical instructions governing their conduct during trial and deliberations. For example, jurors might "doodle," even though they are prohibited from taking notes, or may "vent," when they are forbidden from talking among themselves about the case. Thomas Hafemeister, Juror Stress, 41 Advocate 14 (March 1998).

defense sought the juror's dismissal.[14]

Finally, unlike the Courts in Brown/Thomas/Symington, which held that inquiry must cease once there is even a hint that the dispute centers on the juror's view of the evidence, the Fifth Circuit has placed no limit on the trial judge's authority to conduct inquiries during deliberations, even when, as in this case, it is clear that the inquiry itself is impacting on the deliberative process and creating the impression that the court is siding with the majority. (App. 47-48)

Whether derived from the Due Process Clause of the Fifth Amendment or the Sixth Amendment right to trial by jury, unanimity is "one of the indispensable features of a *federal* jury trial," Johnson v. Louisiana, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring); see also Andres v. United States, 333 U.S. 740, 748-49 (1948). "When verdicts must be unanimous, no member of the jury may be ignored by others." Johnson, 406 U.S. at 396 (Brennan, J., dissenting). Recent research into jury decision-making has confirmed the wisdom of the historic unanimity requirement, revealing that non-unanimous decision-making both alters and diminishes the quality of the deliberative process, encouraging quicker verdicts with less collaborative effort, and minimizing the role of minorities on the jury panel. Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261 (April 2000). These are serious concerns that should be considered before the scope of Rule 23(b) is expanded, as it has been in this case, beyond its original, limited, conception.

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[14] Undoubtedly, trial judges have an incentive to achieve a verdict; a "hung jury," whether the majority is leaning towards conviction or acquittal, is inefficient, and may be perceived as a sign that the judge somehow has failed in his or her duties.

Moreover, crucial to securing the jury trial right is safeguarding the secrecy of jury deliberations. As this Court has written, "the integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States, 347 U.S. 227, 229 (1954). See also Tanner v. United States, 483 U.S. 107 (1987). Allowing a district court to halt deliberations and to conduct a four-day investigation of a particular juror, without regard to its impact on the deliberative process, undermines this principle.

This Court has never addressed the constitutionality of Rule 23(b), or the standards for determining what constitutes "just cause," or what type of inquiry may be engaged in when allegations of misconduct surface during deliberations. The last three years alone have produced five conflicting appellate decisions involving these questions.[15] The Fifth Circuit's opinion in this case has only added to the confusion.

The conflict on the proper application of Rule 23(b) should be resolved by this Court. Criminal defendants should not be subjected to different standards depending on where their trial is held, and jury panels should not be subjected to different levels of judicial intrusiveness depending on nothing more than their location.

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[15] In addition to Thomas, Symington, Abbell, and Edwards, in United States v. Baker, 262 F.3d 124 (2d Cir. 2001), the Second Circuit reaffirmed its holding in Thomas, although it upheld the dismissal of a juror who had acknowledged to the trial court that she had her mind made up before deliberations and refused to deliberate shortly after deliberations had begun. Recently, a District Court in New York, applying Thomas, declared a mistrial, even though the challenged juror indicated that she could not render a verdict, because the controversy was prompted by the juror's views on the merits of the case. United States v. Samet, 207 F.Supp.2d 269 (S.D.N.Y. 2002).

Dismissal of a deliberating juror who is leaning towards acquittal following an extended investigation of that juror and questioning of all of the jurors, all while deliberations have been suspended, goes to the very heart of due process and to the reasonable doubt and unanimity requirements. The dissenting juror, celebrated in such works as "Twelve Angry Men," personifies the ideal that no one should be convicted if even one juror entertains reasonable doubts about the government's case. How that ideal is to be protected is a matter of exceptional importance. The cases are already in conflict, and the issue should be reviewed by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE STANDARDS FOR DETERMINING WHEN A COURT MAY EMPANEL AN ANONYMOUS JURY

Anonymous juries are a recent development in the law. Until the 1979 trial in the Southern District of New York of Leroy "Nicky" Barnes, an alleged drug kingpin with a violent history, anonymous juries were unknown. Abraham Abramovsky & Jonathan I. Edelstein, Anonymous Juries: In Exigent Circumstances Only, 13 St. John's J. Legal Comment. 457 (1999). The Second Circuit's approval of the District Court's decision to empanel an anonymous jury in United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), involving serious threats of witness intimidation, led to the use of anonymous juries in numerous cases involving organized crime defendants. See, e.g., United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); United States v. Ross, 33 F.3d 1507 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995); United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992), cert. denied, 507 U.S. 998 (1993); United States v. Scarfo, 850 F.2d 1015 (3d Cir.), cert. denied, 488 U.S. 910 (1988).

Although the lower courts have approved anonymous juries when "there is strong reason to believe the jury needs protection," United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992), the courts have recognized that withholding juror identifying information from the defense raises serious constitutional concerns. Anonymous juries impact on a defendant's due process right to a presumption of innocence, depersonalize the jurors, and interfere with meaningful voir dire. Perhaps most importantly, they are inherently prejudicial, communicating to the jurors, who are aware that their identities are being shielded, that the defendants somehow pose a risk to their safety. United Sates v. Mansoori, 304 F.3d 635, 650 (7th Cir. 2002); Ross, supra.

Because of these constitutional concerns, until this case, anonymous juries were considered an "extreme measure," United States v. Mansoori, 304 F.3d at 649, to be employed only when the defendants, through their own conduct, created the need for the remedy. In this case, the Fifth Circuit, breaking with precedent, held that it is appropriate to withhold juror identifying information from the defendants, even though the case did not involve organized crime or defendants who otherwise posed a danger to the jury, because the case was a high profile case, and the lower court saw a need to protect the jurors from the media. As the Fifth Circuit acknowledged, "**the overriding concern, and the most important factor in the district court's analysis was the intense media interest and highly charged emotional and political fervor that surrounded the trial.**" (App. 9)[16]

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[16] The Fifth Circuit had previously indicated that it might be acceptable to use an anonymous jury in a high profile case. In United States v. Branch, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185 (1997), involving the trial of the Branch Davidians, an anonymous jury was also employed, in part, to protect the jurors from excessive publicity. But there, unlike here, the defendants were charged with crimes of violence, and

The decision of the Fifth Circuit, authorizing the withholding of juror identifying information whenever there is likely to be intense media interest in a case, is in conflict with the decisions of its sister Circuits, which have limited the use of anonymous juries to situations where the jurors are at risk from the defendants themselves. The conflict was made glaringly apparent within days of the decision in this case when the Seventh Circuit, in Mansoori, supra, held that it was an abuse of discretion to order an anonymous jury, even in a case involving organized crime defendants, where there was no evidence that the individual defendants posed a threat to the jurors.

The use of a remedy that unfairly impacts on the defendants's constitutional rights, when the concern stems from the media, and not the defendants, despite the availability of less prejudicial alternatives, is contrary to well-established constitutional principles that require a court to consider less intrusive alternatives when constitutional rights are balanced against societal needs. See, e.g., Thompson v. Western States Medical Center, 122 S. Ct. 1497 (2002); Reno v. American Civil Liberties Union, 521 U.S. 844, 846 (1997); Riggins v. Nevada, 504 U.S. 127 (1992). Withholding juror identifying information from the press, but providing it to the parties, would accomplish the court's goal of protecting the jurors without burdening the defendant's rights, and would not send the jurors a prejudicial signal that the court thinks that the defendants are dangerous

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the Court recognized that the case "aroused deep passions." Id. at 724. Thus, there was some perceived risk to the jury from the defendants and their supporters. This was a political corruption case, nothing more. While Governor Edwards had his supporters and detractors, his trial did not "arouse deep passions" posing a threat of violence.

people.[17] Yet the Fifth Circuit held that the jurors' privacy interests "trumped" the defendants' constitutional rights.

Although the use of anonymous juries has proliferated in recent years, this Court has not yet addressed the constitutionality of withholding juror identifying information from the parties. Certainly, whether media attention alone justifies that drastic measure, despite the prejudice to the defendants, is an important question that this Court should review. Increasingly, many cases, whether they involve allegations of murder, or kidnaping, or political corruption, or corporate crime, generate enormous media attention. The defendant often has little or no control over whether his trial will become the subject of a media frenzy. Whether the defendant will have the benefit of juror identifying information, including the ability to ferret out bias in individual jurors, should not depend on the vagaries of the media's attention, but on whether the defendant or his associates have or are likely to engage in conduct that justifies compromising the defendant's rights.

If anonymous juries are to be permitted, the lower courts need guidance on when the remedy may be employed and on whether it is authorized in only rare instances when the need to withhold juror identifying information from the defense is proven. The lower courts do not agree on that question and this conflict should be resolved by this Court.

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[17] That is the remedy employed in cases that generated far greater media attention than the Edwards trial – for example, the Timothy McVeigh trial, No. 96 Cr. 00068 (D. Colo. T4/26/97/pp.5133, 5160) and the Unabomber trial. The Unabomb Trial Media Coalition, 183 F.3d 949 (9th Cir. 1999).

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHETHER A COURT MAY CONSIDER MATERIALS NOT PRESENTED TO THE JUDICIAL OFFICER IN A WIRETAP OR WARRANT APPLICATION IN DECIDING WHETHER A FRANKS HEARING IS REQUIRED

This Petition will also raise a question concerning what a court may consider in evaluating whether a hearing, pursuant to Franks v. Delaware, 438 U.S. 154 (1978), is required when an affidavit in support of a search warrant or wiretap application is determined to be false and misleading. In this case, extensive wiretaps were authorized on the basis of an affidavit that misrepresented the reliability of the government's "confidential informant." The Fifth Circuit, without any analysis, adopted the decision in United States v. Brown, 298 F.3d 392 (5th Cir. 2002) (App. 16), which involved the same wiretap applications. In fact, there were three separate opinions in the Brown case. Two Judges held that the wiretap application was misleading. (App. 335, 339) The entire Panel nonetheless agreed that there was probable cause to support the wiretaps based on the Court's review of transcripts of consensual tape recordings made by the informant – transcripts that were summarized by the government in materially inaccurate ways in both Brown and this case, but which were not furnished to the judge who issued the original wiretap authorization.

There is great uncertainty among the Circuits over what the defendant must show in order to establish a right to a Franks hearing. Franks itself held that a warrant can be upheld without a hearing only if, when the misleading material is excised, "there remains sufficient content in the warrant affidavit to support a finding of probable cause." 438 U.S. at 172 (emphasis added). Other Circuits, too, have explicitly held that the only materials that may be considered in evaluating probable cause and the need for a hearing are the materials actually presented to the issuing

magistrate or judge. See, e.g., United States v. Weaver, 99 F.3d 1372, 1378 n.3 (6th Cir. 1996) (noting that the government cannot bolster affidavit with material submitted at suppression hearing); United States v. Vigeant, 176 F.3d 565, 569 (1st Cir. 1999) (probable cause must be determined from "four corners of the affidavit"); Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), rev'd on other grounds, 428 U.S. 465 (1976) (probable cause must be shown to magistrate and cannot be gained from other information).

The decision in this case is in conflict with Franks and with the decisions of other Circuits. It dispenses with the need for a Franks hearing if the reviewing court, exercising de novo review, determines from a retroactive evaluation of the evidence in the record that probable cause would have existed to justify the warrant, even if the evidence being considered by the reviewing court was not presented to the judicial officer issuing the warrant. In other words, in the Fifth Circuit, the standard for determining whether an evidentiary hearing is required is not whether the excised affidavit would, by itself, support a finding of probable cause, but whether the reviewing court, in light of all the information made available to it, retroactively finds probable cause to support the warrant.

Resolving the conflict is exceptionally important. Wiretaps are extraordinarily intrusive and are of broad geographic scope. There is a compelling need for a uniform standard of review. Consequently, certiorari should be granted on this issue.

CONCLUSION

This Petition raises three important constitutional issues about which the law is in conflict. Had the defendants prevailed on any of these issues, the government likely would have sought certiorari because of their significance. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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